FEDERAL MARITIME COMMISSION

DOCKET NO. 86-30

INVESTIGATION OF UNFILED AGREEMENTS -
YANGMING MARINE TRANSPORT, EVERGREEN MARINE
CORPORATION AND ORIENT OVERSEAS CONTAINER LINE, INC.

OFFER OF SETTLEMENT
JOINTLY SUBMITTED BY
RESPONDENTS AND HEARING COUNSEL

WHEREAS, on December 24, 1985 the Federal Maritime Commission issued an order under Section 15 of the Shipping Act of 1984 ("the 1984 Act") directed to Respondents and others requiring them to respond to interrogatories and document requests related to the trade from the U.S. to Taiwan ("the Section 15 Order"); and

WHEREAS, the Respondents did file responses to the Section 15 Order; and

WHEREAS, by its Order of November 25, 1986 ("the Order"), the Federal Maritime Commission commenced an investigation as to whether certain actions of Respondents may have constituted violations of the Shipping Act, 1916 (1916 Act) and the 1984 Act; and

WHEREAS, Respondents believe and assert that their actions were conducted with the concurrence and approval of the Taiwan authorities and were in all respects lawful under the 1916 Act and the 1984 Act and believe that their position would be vindicated in this proceeding; and

WHEREAS, Respondents nonetheless wish to minimize the potential time and expense which might be consumed by this proceeding were it to continue to an evidentiary hearing and beyond; and

WHEREAS, in order to minimize their legal expenses and diversion of management time and in order to settle the issues raised by the Order,[1] Respondents are willing to consent (1) to cease and desist from discussing and attempting to fix rates for the common carriage of commodities in the U.S. to Taiwan Trade, until an agreement authorizing such activity is filed at the Federal Maritime Commission and becomes effective under the 1984 Act; and (2) to pay a civil penalty; but only on the clear understanding that Respondents expressly deny the allegations and statements in the Section 15 Order and the Order or that they have violated the law; and

[1] The Order instituting this proceeding made references to the Section 15 Order and responses (including certain information and documents) thereto. Although the Section 15 Order raised issues in addition to those cited in the Order, none of them were placed in issue in this proceeding by the Order. However, in another proceeding, Docket No. 87-2, Investigation of Rebates and Other Malpractices - Yang Ming Marine Line, A.K.A. Yangming Marine Transport Corporation and Yang Ming Line, the Order of Investigation did raise questions concerning rebating and other malpractices with respect to the common Respondent in both Docket No. 87-2 and this proceeding. Hearing Counsel and Respondents agree that the scope of this settlement and offer of settlement include and encompass the final disposition of all other Shipping Act (1916 Act and 1984 Act) issues raised by the Section 15 Order and responses (including information and documents) thereto as to all Respondents, for the period of time from January 1, 1983 to November 30, 1986, and shall forever bar any investigation, assessment proceeding, civil action, demand for recovery of civil penalties, or for other relief as to those issues, except for those issues involved in Docket No. 87-2 with respect to Respondent Yangming Marine Transport. Only the Docket No. 87-2 issues shall survive the settlement and offer of settlement herein.

WHEREAS, this offer of settlement is conditioned upon the issuance of a final order which fully disposes of this proceeding and states that any and all demands by the Commission for or based on violations of law or liability for penalties under the 1984 Act and the 1916 Act set forth in or arising from the Order, or from materials received by the Commission in connection with the Order are finally resolved without any admission of liability or violation of law by any Respondent; and

WHEREAS, the Commission's Bureau of Hearing Counsel joins in this offer of settlement and urges approval of this proposed settlement;

NOW, THEREFORE, Respondents do make this offer of settlement:

1. That Respondents shall cease and desist, now and forever, from discussing and attempting to fix rates for the common carriage of commodities in the U.S. to Taiwan Trade, until such time as an agreement authorizing such activity is filed and becomes effective at the Federal Maritime Commission, pursuant to the 1984 Act.

2. That the final order in this proceeding shall become effective as to each Respondent upon satisfactiion of Respondents' offer to pay to the Federal Maritime Commission, without admission of violation of law or liability, the sum of $400,000 ($133,333.33 per Respondent), provided that each Respondent is individually liable to pay only $133,333.33 with interest from the date funds were deposited in escrow accounts by Respondents.

3. That, upon final approval of this offer of settlement, any investigation, assessment proceeding, civil action,

demand for recovery of civil penalties, or for other relief, set forth in or arising from the Order or from information and documents or any other materials received by the Commission in connection with the Order, shall be forever barred.

4. That until this proceeding is terminated by an administratively final order, all written material (and all copies thereof) produced by Respondents pursuant to or in connection with the Section 15 Order or the Commission's Order of Investigation served November 26, 1986 shall continue to be held in confidence by the Commission; that after this proceeding is terminated by an administratively final order, one copy of the material produced by each Respondent may be retained by the FMC's Bureau of Hearing Counsel ("Hearing Counsel") in confidence solely for Hearing Counsel's guidance as to the scope of this settlement, and shall not be copied or otherwise reproduced in any manner whatsoever while in the possession of Hearing Counsel; that Hearing Counsel shall immediately notify Respondents of any request or attempt by a third party to obtain access to those materials; and that 18 months after this settlement becomes administratively final, the materials retained by Hearing Counsel shall, upon request, be returned to the Respondent which produced the material.

5. That the factual underpinnings to support final approval of this offer of settlement are attached hereto in the form of a stipulation of facts which has been agreed to and stipulated to by Hearing Counsel and counsel for Respondents and submitted to the Administrative Law Judge of record, but, except as

previously provided herein (including the footnote hereto), that no finding or stipulation of fact in this proceeding may be used by any person against any Respondent in any way in any other proceeding in this or any other forum.

Dated as of January 7, 1988

David R. Kay, Counsel
Orient Overseas Container Line

Harold E. Mesirow, Counsel
Evergreen Marine Corporation

Paul M. Keane, Counsel
Yangming Marine Transport

Seymour W. Glanzer
Director
Bureau of Hearing Counsel

Ronald D. Murphy
Bureau of Hearing Counsel

(FEDERAL MARITIME COMMISSION)
(SERVED FEBRUARY 3, 1988)
(EXCEPTIONS DUE 2-25-88)
(REPLIES TO EXCEPTIONS DUE 3-18-88)

FEDERAL MARITIME COMMISSION

NO. 86-30

INVESTIGATION OF UNFILED AGREEMENTS -
YANGMING MARINE TRANSPORT, EVERGREEN MARINE
CORPORATION AND ORIENT OVERSEAS CONTAINER LINE, INC.

Settlement of a proceeding to determine whether the Respondents violated section 15 of the Shipping Act, 1916, and section 10 of the Shipping Act, 1984, by discussing and attempting to set rates in the United States to Taiwan trade without filing an agreement with the Federal Maritime Commission, and, if so, to determine whether or not penalties should be assessed, appproved. Each Respondent ordered to pay $133,333.33, plus interest, pursuant to terms of a settlement agreement made part of this decision.

Stephen H. Vengrow and Paul M. Keane for Respondent Yangming Marine Transport.
Harold Mesirow for Respondent Evergreen Marine Corporation.
Seymour H, Kligler and David R. Kay for Respondent Orient Overseas Container Line, Inc.
Seymour Glanzer, Ronald D. Murphy and Vern W. Hill, for the Bureau of Hearing Counsel.

INITIAL DECISION[1] OF JOSEPH N. INGOLIA,
ADMINISTRATIVE LAW JUDGE

This proceeding was instituted by Order of Investigation and Hearing ("Order"), served November 26, 1986, pursuant to

[1] This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practiceand Procedure, 46 CFR 502.227).

section 22 of the Shipping Act, 1916 (46 U.S.C. app. 821), and section 11 of the Shipping Act, 1984 (46 U.S.C. app. 1710), to determine whether or not the Respondents, Yangming Marine Transport (Yangming), Evergreen Marine Corporation (Evergreen), and Orient Overseas Container Line (OOCL), violated the 1916 and 1984 Shipping Acts, sections 15 and 10(a)(2) (46 U.S.C. app. 814 and 46 U.S.C. app. 1709), respectively, by discussing and attempting to set rates in the United States to Taiwan trade without filing an agreement with the Commission.[2]

On January 11, 1988, the Respondents and Hearing Counsel jointly submitted an Officer of Settlement which is made a part of this decision as Appendix A. Discussed below are matters pertinent to consideration of the offer of settlement.

I.

RELEVANT STATUTES AND REGULATORY FACTORS

A. Substantive Provisions

Section 15 of the Shipping Act, 1916, provides in pertinent part:

> SEC. 15. Every common carrier by water in interstate commerce, or other person subject to this Act, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement, with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating

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[2] The Order was preceded by the Commission's Order entitled, "United States to Taiwan Inquiry," which directed the Respondents to answer 19 questions relating to the United States to Taiwan trade.

transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. . . .

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations. . . .

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the provisions of any regulations the Commission may adopt.

* * *

Whoever violates any provision of this section shall be subject to a civil penalty of not more than $1,000 for each day such violation continues; . . .

As can be seen from the above language Section 15 specifically provides that the Commission approve agreements and obviously where an agreement is not submitted it cannot be approved.

The Shipping Act of 1984 is crafted a little differently than the pertinent provisions of the 1916 Act, but the statutory requirements and their effects are the same.

Section 5 of the 1984 Act provides that:

> SEC. 5. AGREEMENTS.
>
> (a) FILING REQUIREMENTS.--A true copy of every agreement entered into with respect to an activity described in section 4 (a) or (b) of this Act shall be filed with the Commission, except agreements related to transportation to be performed within or between foreign countries and agreements among common carriers to establish, operate, or maintain a marine terminal in the United States. In the case of an oral agreement, a complete memorandum specifying in detail the substance of the agreement shall be filed. The Commission may by regulation prescribe the form and manner in which an agreement shall be filed and the additional information and documents necessary to evaluate the agreement.

The remaining paragraphs of section 5 deal with different kinds of agreements; paragraph (a) with Conference Agreements, paragraph (c) with Interconference Agreements, paragraph (d) with Assessment Agreements and paragraph (e) with Maritime Labor Agreements.

Section 6 (46 U.S.C. app. 1705(c)) provides, in pertinent part, that:

> SEC. 6. ACTION ON AGREEMENTS.
>
> (a) NOTICE.--Within 7 days after an agreement is filed, the Commission shall transmit a notice of its filing to the Federal Register for publication.

(b) REVIEW STANDARD.--The Commission shall reject any agreement filed under section 5(a) of this Act that, after preliminary review, it finds does not meet the requirements of section 5. The Commission shall notify in writing the person filing the agreement of the reason for rejection of the agreement.

(c) REVIEW AND EFFECTIVE DATE.--Unless rejected by the Commission under subsection (b), agreements, other than assessment agreements, shall become effective--

(1) on the 45th day after filing, or on the 30th day after notice of the filing is published in the Federal Register, whichever day is later; or

(2) if additional information or documentary material is requested under subsection (d), on the 45th day after the Commission receives--

(A) all the additional information and documentary material requested; or

(B) if the request is not fully complied with, the information and documentary material submitted and a statement of the reasons for noncompliance with the request. The period specified in paragraph (2) may be extended only by the United States District Court for the District of Columbia upon an application of the Commission under subsection (j).

(d) ADDITIONAL INFORMATION.--Before the expiration of the period specified in subsection (c)(1), the Commission may request from the person filing the agreement any additional information and documentary material it deems necessary to make the determinations required by this section.

(e) REQUEST FOR EXPEDITED APPROVAL.--The Commission may, upon request of the filing party, shorten the review period specified in subsection (c), but in no event to a date less than 14 days after notice of the filing of the agreement is published in the Federal Register.

Just as with section 15 of the Act, under section 6 of the 1984 Act, an agreement cannot become effective if it is never filed with the Commission.

B. Penalties

As to penalties for implementing an agreement that has not been properly filed and approved by the Commission, it has already been noted that under section 15 of the 1916 Act the penalty is, "not more than $1,000 for each day such violation continues." In addition section 32 of the 1916 Act contains the general penalty provisions. It provides that:

> (e) Notwithstanding any other provision of the law, the Commission shall have authority to assess or compromise all civil penalties provided under this Act: Provided, however, That, in Order to assess such penalties a formal proceeding under section 22 of this Act shall be commenced within five years from the date when the violation occurred.

Also, under the 1984 Act, section 13(a) (46 U.S.C. app. 1712(a)) provides in pertinent part:

> SEC. 13. PENALTIES.
>
> (a) ASSESSMENT OF PENALTY.--Whoever violates a provision of this Act, a regulation issued thereunder, or a Commission order is liable to the United States for a civil penalty. The amount of the civil penalty, unless otherwise provided in this Act, may not exceed $5,000 for each violation unless the violation was willfully and knowingly committed, in which case the amount of the civil penalty may not exceed $25,000 for each violation. Each day of a continuing violation constitutes a separate offense.

and, under section 13(c) (46 U.S.C. 1712(c)), that:

> (c) ASSESSMENT PROCEDURES.--Until a matter is referred to the Attorney General, the Commission may, after notice and an opportunity for hearing, assess each civil penalty provided for in this Act. In determining the amount of the penalty, the Commission shall take into account the nature, circumstances, extent, and gravity of the violation committed and,

with respect to the violator, the degree of culpability, history of prior offenses, ability to pay, and such other matters as justice may require. The Commission may compromise, modify, or remit, with or without conditions, any civil penalty.

Finally, the Commission's regulations governing the compromise, settlement and collection of penalties, 46 CFR Part 505, provide in pertinent part, at 505.3, that:

> (a) Procedure for assessment of penalty. The Commission may assess a civil penalty only after notice and opportunity for a hearing under section 22 of the Shipping Act, 1916, or sections 11 and 13 of the Shipping Act of 1984. The proceeding, including settlement negotiations, shall be governed by the Commission's Rules of Practice and Procedure in Part 502 of this Chapter. All settlements must be approved by the Presiding Officer. The full text of any settlement must be included in the final order of the Commission.
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> (b) Criteria for determining amount of penalty. In determining the amount of any penalties assessed, the Commission shall take into account the nature, circumstances, extent and gravity of the violation committed and the policies for deterrence and future compliance with the Commission's rules and regulations and the applicable statutes. The Commission shall also consider the respondent's degree of culpability, history of prior offenses, ability to pay and such other matters as justice requires.

II.

OFFER OF SETTLEMENT

On January 7, 1988, all of the parties in this proceeding filed an "Offer of Settlement Jointly Submitted by Respondents and Hearing Counsel" (the "Settlement"). It should be noted at the outset that the Settlement applies only to the issues raised in Docket No. 86-30 and not to those issues involved in Docket No. 87-2. The parties state that:

[1] The Order instituting this proceeding made references to the Section 15 Order and responses (including certain information and documents) thereto. Although the Section 15 Order raised issues in addition to those cited in the Order, none of them were placed in issue in this proceeding by the Order. However, in another proceeding, Docket No. 87-2, Investigation of Rebates and Other Malpractices - Yang Ming Marine Line, A.K.A. Yangming Marine Transport Corporation and Yang Ming Line, the Order of Investigation did raise questions concerning rebating and other malpractices with respect to the common Respondent in both Docket No. 87-2 and this proceeding. Hearing Counsel and Respondents agree that the scope of this settlement and offer of settlement include and encompass the final disposition of all other Shipping Act (1916 Act and 1984 Act) issues raised by the Section 15 Order and responses (including information and documents) thereto as to all Respondents, for the period of time from January 1, 1983 to November 30, 1986, and shall forever bar any investigation, assessment proceeding, civil action, demand for recovery of civil penalties, or for other relief as to those issues, except for those issues involved in Docket No. 87-2 with respect to Respondent Yang Ming Transport. Only the Docket No. 87-2 issues shall survive the settlement and offer of settlement herein.

In the Settlement the parties agree that, (1) the Respondents will not attempt to discuss or fix rates in the U.S. to Taiwan trade until an agreement authorizing such activity is filed with the Commission and has become effective, (2) that each Respondent will pay the Commission $133,333.33, with interest from the dates the funds were deposited in escrow, without any admission of violation of law or liability, and that (3) upon final approval of the Settlement, any investigation, assessment proceeding, civil action, demand for recovery of civil penalties, or for other relief, set forth in or arising from the Order or from information and documents or any other materials received by the Commission in connection with the Order, shall be forever

barred. In addition, the parties agreed that certain procedures be followed as to confidentiality and as to the treatment of the stipulation of facts. These matters will be discussed later in the Discussion portion of this decision.

III.

DISCUSSION

A. Facts

The parties have jointly stipulated the following facts and they are so found.

1. Yangming is an ocean common carrier and a tramp operator which, inter alia, provides ocean common carriage of raw cotton from the United States to Taiwan.

2. Evergreen is an ocean common carrier which, inter alia, provides ocean common carriage of raw cotton from the United States to Taiwan.

3. OOCL is an ocean common carrier which, inter alia, provides ocean common carriage of raw cotton from the United States to Taiwan.

4. Chinese Maritime Transport, Ltd. (CMT), a Taiwan shipping company affiliated with OOCL, is the General Agent for OOCL in Taiwan.

5. Yangming is a Taiwan flag carrier.

6. Evergreen is headquartered in Taiwan and operates Taiwan flag vessels.

7. Yangming was not a party to an effective rate agreement on file at the Federal Maritime Commission (FMC) on or after

January 1, 1983. From January, 1983 to October 14, 1983, OOCL was a member of the Pacific Westbound Conference, from October 15, 1983 to January 21, 1985, OOCL operated without membership in an effective rate agreement at the FMC, and since January 21, 1985 to present OOCL has been a member of the Transpacific Westbound Rate Agreement ("TWRA"). Evergreen was a member of the TWRA from January 21, 1985 to March 22, 1986; at all other times since January 1, 1983 Evergreen operated without membership in an effective rate agreement at the FMC.

8. The Association of Shipping Services ("AOSS") and its predecessor, the Overseas Joint Shipping Office ("OJSO"), were associations of Taiwan flag ocean carriers, found in accordance with the policy of Taiwan as set forth in the Shipping Enterprise Act of Taiwan and Decrees of the Ministry of Communication ("MOC") of Taiwan in order to promote the development of Taiwan's worldwide foreign trade.

9. By memorandum dated March 8, 1986, Frederick F. Chien[3] of the Coordination Council for North American Affairs advised Mr. David Dean of the American Institute in Taiwan, that: (i) AOSS was formed in accordance with "the national policy" of Taiwan as set forth in its laws and decrees of MOC to promote the development of Taiwan's worldwide foreign trade; (ii) AOSS carries out Taiwan's laws and policies; (iii) all Taiwan companies operating vessels in Taiwan are expected to and do

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[3] Dr. Chien is Taiwan's highest ranking official in the United States and Mr. Dean is the United States' highest ranking official in Taiwan.

become members of AOSS and to comply with its rules and regulations; (iv) the MOC approves and disapproves proposed actions of the AOSS, and communicates its policy to the AOSS; (v) it is Taiwan policy that through the AOSS, its members will offer rates and service commitments to Taiwan consignee associations; (vi) the Taiwan government affirmed that all actions taken by the AOSS and its members during the years 1983 - 1985 were in pursuit of Taiwan laws and policy and met with the approval of Taiwan authorities; and (vii) an MOC representative is present at all AOSS meetings.

10. All companies operating Taiwan flag vessels and all Taiwan companies engaged in common carriage were expected by the Taiwan authorities to join OJSO and AOSS and to comply with their rules and regulations.

11. The Shipping Enterprise Act ("SEA") is the statute by which the Taiwan authorities regulate the for-hire carriage of passengers or goods by vessel [SEA, Article 2(2)]. The legal requirements and policies of the SEA are administered and implemented by the MOC.

12. The purpose of the SEA as set forth in Article 23 is "To fully utilize the overall capacity of sea carriage concerns in concert with the development of foreign trade." Article 23 seeks to accomplish that purpose by empowering MOC to "coordinate sea carriage concerns in forming joint operations." Pursuant to Article 23 these associations must agree upon a charter which, before implementation, must be approved by the MOC. Article 32 gives MOC broad powers to require Taiwan carriers "to take

necessary measures to meet the requirements for the development of the shipping industry, maintenance of proper order in shipping and furtherance of the public interest."

13. OJSO's charter authorized OJSO to have several "functions," including inter alia, developing sources of cargo business; drawing up, revising and deliberation of standards of freight rates; and restricting and supervising joint shipping operations of Taiwan flag carriers, including the three respondents, in the U.S. to Taiwan trade.

14. AOSS and OJSO were set up by the MOC pursuant to Article 23 in furtherance of the statutory mandates of the SEA. For purposes of this stipulation, references to the AOSS are deemed to apply equally to the OJSO for the period prior to September 9, 1984 at which time the AOSS officially succeeded the OJSO. The purpose of the AOSS, as set forth in Article 3 of its Articles of Organization, was and is, as a public entity, to coordinate the trade requirements, operation capabilities, and promote the common business interest of "national flag vessels." the Articles of Organization were reviewed and approved by MOC as required by the SEA.

15. Membership in the AOSS was and is composed of Taiwan flag carriers. The Lines have been members of the AOSS since September 21, 1984, and continue to be members.

16. AOSS has a Board of Directors, composed of Directors appointed by its members and a Board of Managing Directors, some of whom are elected from among the members of the Board of Directors, subject to regulation and supervision of the MOC.

17. By letter dated April 11, 1986, MOC stated that: (i) the AOSS rules and principles were approved by the MOC; (ii) CMT, Evergreen and Yangming membership in the AOSS constitutes compliance with the policies of the Taiwan government; and (iii) the coordinated activities and business practices of the AOSS shall not be construed or interpreted in the same manner of an international "tariff agreement" or "conference."

18. The AOSS contains eleven (11) joint operating committees, to wit, Committee on Bulk Cargo Shipment, Northeast Asian Liners Committee, Raw Cotton Committee, North American Liners Committee, European Liners Committee, African Liners Committee, Log Vessel Committee, Southeast Asian Liners Committee, Middle East Liners Committee, Reefers Committee, and Taiwan - Hong Kong Liners Committee. The number of committees may be increased or decreased upon approval by the MOC. Similarly, each committee sets up its own rules, with the approval of the MOC, to carry out its functions and to enforce compliance by the committee's member lines.

19. The Raw Cotton Committee (RCC) is concerned with the carriage of cotton from worldwide sources including the United States to Taiwan.

20. Evergreen, Yangming and OOCL (through CMT) are presently members of the RCC and North American Liners Committee and have continuously been members since September 21, 1984.

21. During the period from January 1, 1983 to September 11, 1984, the RCC was a committee of the OJSO. The OJSO

representative to the RCC handled the collection and disbursement of RCC funds.

22. The importation of raw cotton from the United States to Taiwan was on a F.A.S. basis. The Taiwan Cotton Spinners Association ("TCSA") is an entity comprised of Taiwan manufacturer consignee importers.

23. At the RCC meeting on May 27, 1983, the CMT representative commented that U.S. flag vessels had lowered their prices "for sake of competition."

24. On October 18, 1983, the RCC resolved as follows: "That all member companies should note the situation in which all raw cotton freight rate from the States to Taiwan be kept at similar level whenever possible shipped from the East Coast or West Coast to avoid cut threat competition [sic] for benefit of member at next meeting it will be given the guidance of situation of market freight rate."

25. On December 12, 1983, the RCC discussed the then current freight rates of the various carriers for raw cotton from the U.S. West Coast to Taiwan.

26. The Taiwan authorities view the importation of cotton and all matters relating to the terms and conditions of its importation as matters of great public interest and important national concern.

27. The AOSS through its Raw Cotton Committee engaged in discussions and correspondence with the TCSA in an attempt to reach a contractual agreement with the TCSA upon a freight rate and other terms for the carriage of raw cotton from the United

States on the vessels of AOSS members. these discussions took place between February 1984 and November 1984 at which time the parties determined that no such agreement could be reached.

28. On February 23, 1984, the RCC discussed freight rates for shipping raw cotton from the United States and the number of days consignees would be allowed to delay payment after receiving the cotton. The minutes of the meeting state that the member carriers would observe uniform freight rates and terms of payment. However, Respondents did not in fact observe these uniform freight rates.

29. On July 23, 1984, the RCC discussed the TWRA's decision to raise the freight rate on raw cotton shipped from the U.S. West Coast to Taiwan to US$68/MT, effective August 11, 1984, but expressed doubt that the higher rate would be acceptable to buyers.

30. On August 23, 1984, Yangming filed a rate increase on raw cotton shipped from the U.S. West Coast to Taiwan from US$60/MT to US$68/MT, effective September 25, 1984. On August 24, 1984, Evergreen filed a rate increase on the same traffic from US$50/MT to US$68/MT, effective September 25, 1984. On August 24, 1984, OOCL filed a rate increase from US$50/MT to US$68/MT, scheduled to take effect on September 25, 1984. Although the US$68/MT rates were filed by the Respondents, no one of them ever became effective as they were subsequently superseded by other rates, except that Evergreen's US$68/MT rate technically was effective for one day during the period. Prior to August 23, 1984, other carriers in the trade had filed rates on raw cotton from the U.S. West Coast to Taiwan of US$68/MT.

31. Contacts between the AOSS and TCSA regarding rates in the trade took place periodically in 1985 through May of that year. The parties were not able to reach agreement upon a raw cotton rate.

32. In January of 1985, both OOCL and Evergreen were members of TWRA. On January 31, 1985, the member lines of TWRA unanimously agreed to general rate increases which, among other things, established freight rates on raw cotton shipped from the U.S. to US$47/MT plus US$6/MT for T.R.C. effective March 6, 1985. These rate increases were subsequently postponed by the TWRA member lines, including Evergreen and OOCL, from March 6, 1985 to March 20, 1985. On February 6, 1985, the RCC discussed the TWRA's proposed increase in freight rates on raw cotton shipped from the U.S. which had been filed with the FMC to become effective March 6, 1985. RCC resolved to increase its rates "accordingly" effective March 7, 1985. As members of TWRA, OOCL's and Evergreen's rates were increased to US$47/MT effective March 20, 1985. Yangming increased its raw cotton rate from the U.S. to US$47/MT effective March 30, 1985.

33. On May 17, 1985, RCC again discussed raw cotton freight rates from the U.S. to Taiwan. It was noted that previously RCC had agreed on a freight rate of US$47/MT, but were unable to obtain business.

34. During the period January 1, 1983 through November 30, 1985, and thereafter, each Respondent has offered its own cotton rate which for the most part differed from the rate of the others.

B. Law and Findings

In urging the adoption of the Settlement the parties assert different legal arguments which serve to clarify the basic issues involved. The Respondents state that they would argue that the laws of Taiwan require them to belong to and participate in the AOSS, an association of all Taiwan flag carriers, which is a vehicle for Taiwan's worldwide transportation and trade policies so that there was no conference or agreement within the meaning of the Shipping Acts. They aver that their actions are protected by the "act of state" doctrine and that they were compelled and required to participate in the AOSS and related entities (the OJSO and RCC), so that they may not be "charged with the consequences" of their acts. They also allege that in their dealings with the TCSA they were preparing to negotiate and not carrying out an unapproved agreement. The Respondents make other arguments and their position is more fully set forth in their Joint Memorandum in Support (pages 11 through 15). The Respondents conclude that:

> While the outcome of any litigation is uncertain, the Respondents assert they are confident that they have not violated the law. Nonetheless, as can be seen from the fact stipulation and the Respondents' list of defenses, this litigation would be considerably complicated by the apparent conflict between the laws of the United States and those of Taiwan.

On the other hand, Hearing Counsel argues that neither the RCC nor the AOSS were governmental entities and that no governmental action required the Respondents to discuss freight

rates as members of the RCC and AOSS. Further, Hearing Counsel asserts that matters discussed at AOSS meetings were agreements within the meaning of section 15 of the 1916 Act and section 10(a)(2) of the 1984 Act. It argues that the "Act of State" doctrine does not protect the Respondents' actions. Hearing Counsel's position and arguments are more fully set forth in the Joint Memorandum in support (pp. 15 through 19). It concludes that:

> The costs of litigating this matter would be substantial. The actions Respondents are charged with took place almost entirely on Taiwan. Obtaining sworn testimony of individuals located in Taiwan presents complex legal issues, the resolution of which would be lengthy and costly. The problem of language and difficulties inherent in translation, the need for documents, the travel requirements, and the anticipated extensive evidentiary record would impose a substantial financial burden on all parties.
>
> In addition to a lengthy and difficult hearing, the proceeding would also require extensive, detailed briefing of the factual and legal issues involved and would likely require as much time as the hearing itself. Ultimate conclusion of the proceeding would most likely have to await initial decision, exceptions, Commission review, and the potential for judicial review.
>
> Litigation of this matter would be long and expensive for both the Respondents and the Bureau of Hearing Counsel. The Offer would save all parties substantial time and money and minimize the Respondents' legal expenses and the diversion of management time.

Given all of the above, it remains for the undersigned, under the authority of 46 CFR 505.3(a), to decide whether or not the Settlement should be approved. In so doing it is appropriate to begin with the Administrative Procedure Act (5 U.S.C. 554(c)(1)) ("APA"). That Act specifically requires agencies to

give interested parties an opportunity to submit offers of settlement, "when time, the nature of the proceeding, and the public interest permit." Congress intended the provision to be applied liberally stating:

> . . . even where formal hearing and decision procedures are available to parties, the agencies and the parties are authorized to undertake the informal settlement of cases in whole or in part before undertaking the more formal hearing procedure. Even courts through pretrial proceedings dispose of much of their business in that fashion. There is much more reason to do so in the administrative process, for informal procedures constitute the vast bulk of administrative adjudication . . . The statutory recognition of such informal methods should strengthen the administrative arm and serve to advise private parties that they may legitimately attempt to dispose of cases at least in part through conferences, agreements, or stipulations.

Senate Committee on the Judiciary, Administrative Procedure Act - Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess. 24 (1946).

It is well-settled that courts generally favor settlements, including those coming under the APA provision. Pennsylvania Gas and Water v. Federal Power Commission, 463 F.2d 1242, 1247 (D.C. Cir., 1972).

The Commission, too, has long recognized and applied the law favoring settlements. In Old Ben Coal Company v. Sea-Land Service, Inc., 21 F.M.C. 506, 512 (1978), 18 SRR 1085, 1092, it stated:

> . . . the law favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation, and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy . . . The resolution of

> controversies by means of compromise and settlement is generally faster and less expensive than litigation; it results in a saving of time for the parties, the lawyers, and the courts and it is thus advantageous to judicial administration, and, in turn, to government as a whole.

See also Del Monte Corp. v. Matson Navigation Co., 22 F.M.C. 365 (1979), 19 SRR 1037, 1039; Behring International, Inc. Independent Ocean Freight Forwarder License No. 910 (Initial Decision, March 17, 1981, administratively final June 30, 1981), 20 SRR 1025, 1032-33.

Not only has the Commission followed a policy of favoring settlements, but it has approved settlements of administrative and investigative proceedings even when, as here, there has been no admission or finding of violations of the Shipping Act. Eastern Forwarding International, Inc. - Independent Ocean Freight Forwarder Application - Possible Violations, Section 44, Shipping Act, 1916 (Initial Decision, July 30, 1980, administratively final September 8, 1980), 20 SRR 283, 286 ("Eastern"); Far Eastern Shipping Co.--Possible Violations of Sections 16, Second Paragraph, 18(b)(3), and 18(c), Shipping Act, 1916 (Initial Decision, March 25, 1982, administratively final May 7, 1982), 21 SRR 743, 764 ("FESCO"); Armada Great Lakes/East Africa Service, Ltd.; Great Lakes Transcaribbean Line (Initial Decision, March 21, 1986, administratively final April 25, 1986), 23 SRR 946, 949 ("Armada"); Member Lines of the Transpacific Westbound Rate Agreement - Possible Violations of the Shipping Act of 1984 (Initial Decision, August 27, 1986, administratively final October 9, 1986), 23 SRR 1329, 1340 ("TWRA").

In approving proposed settlements the Commission has set forth those standards which it considered appropriate. They were summarized in FESCO, supra, as follows:

> . . . settlement may be based upon a determination that the agency's "enforcement policy in terms of deterrence and securing compliance, both present and future, will be adequately served by acceptance of the sum to be agreed upon"; that "the amount accepted in compromise . . . may reflect an appropriate discount for the administrative and litigative costs of collection having regard for the time it will take to effect collection"; the value of settling claims on the basis of pragmatic litigative probabilities, i.e., the ability to prove a case for the full amount claimed either because of legal issues involved or a bona fide dispute as to facts; and that penalties may be settled "for one or for more than one of the reasons authorized in this part."

The relationship between the criteria for assessment of penalties and the criteria for approving settlements is summarized in Armada, supra, 23 SRR at 956, as follows:

> As seen, Section 13(c) of the 1984 Act and §505.3 of the Commission's regulations, which implements both Section 13 of the 1984 Act and Section 32 of the 1916 Act, explicitly set forth criteria for assessment of penalties, and while they do not directly address the criteria for settlement of penalties, I believe the latter are subsumed by the former. This is manifest from the history of the settlement process at the Commission.
>
> Section 32(e) of the 1916 Act was enacted in 1977. [Footnote omitted] The rules and regulations implementing Section 32(e) were promulgated and published by the Commission in a predecessor version of 46 CFR §505, in 1979. Under those rules the "criteria for compromise, settlement or assessment" might "include but need not be limited to those which are set forth in 4 CFR Parts 101-105." . . . Those standards, particularly, the standards enumerated in 4 CFR §103, were a part of the Commission's program for settlement and collection of civil penalties even before the authority to assess penalties was given the Commission pursuant to Section 32(e). More to the point, it was

> held that those standards provided criteria for both settlements and assessments. "They continue to provide valuable assistance to the Commission as an aid in determining the amount of penalty in assessment proceedings and in determining whether to approve proposed settlements in assessment proceedings." [citing Eastern and Behring International, Inc., supra.]

See also Marcella Shipping Co. Ltd. (Initial Decision, February 13, 1986, administratively final, March 26, 1986), 23 SRR 857, 866.

In applying the appropriate criteria to the Settlement involved here it is necessary to balance agency enforcement policy in terms of deterrence and securing future compliance, litigative probabilities, litigative and administrative costs and such other matters as justice may require. In their Joint Memorandum in Support of the Offer in Compromise, the parties urge adoption of the Settlement by discussing the various criteria. As to enforcement policy Hearing Counsel stresses the importance of future compliance and deterrence. It notes that the cease and desist order which is part of the settlement insures future compliance. Further, it believes that the monetary payments provided for in the Settlement achieve the desired deterrent effect and that they emphasize the fact that "the Commission is determined to bring about compliance with agreement filing requirements of the 1984 Act." On the other hand, the Respondents, while insisting they did not attempt to fix rates or implement a common rate scheme, agree that they are "willing to conform their conduct to the requirements of the 1984 Act consistent with their obligations and responsibilities under

the laws of Taiwan."[4] Further, the Respondents believe the amount of the payments involved "is substantial and fairly reflects the seriousness of the issues involved," although they do not believe it is a "deterrent," because they "were not culpable and their violations, if any, were neither willful or substantial."

As to litigative probabilities--another of the criteria for settlement--it is clear that in this proceeding there are several bona fide disagreements between the parties both as to the facts and as to the law. The Respondents assert several defenses based on the assertion that their actions in the AOSS did not involve a conference or an agreement, and that they are protected by the "Act of State" doctrine. It avers that the U.S. government knew about the governmental status of AOSS and OJSO, and is estopped from denying that status. Further, the Respondents argue that their negotiations of rates with TCSA was an activity required by section 10(b)(13) of the 1984 Shipping Act and that the activity was "preparing to negotiate" a service contract rather than the adoption of an agreement required to be filed by section 5 of the Act. Hearing Counsel, as has been noted, disagrees with the Respondents. It argues that no governmental action required the Respondents to discuss freight rates as members of the AOSS and RCC, that those discussions constituted an agreement falling within the purview of section 15 of the 1916 Act, and section 4

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[4] Counsel for Respondents have indicated in a telephone meeting that this argument in no way is meant to qualify or make conditional the agreement of their clients to comply with the terms of paragraph 1 of the Settlement.

lof the 1984 Act. Further, Hearing Counsel avers that the Respondents' activities constituted a continuing violation of the shipping Acts, not protected by the "Act of State" doctrine, and subjects the Respondents to the imposition of penalties under both Shipping Acts.

Finally, as to the cost of litigation, all of the parties agree that the proceeding involves "complex legal issues, the resolution of which would be lengthy and costly. They agree that the Settlement "would save all parties substantial time and money and minimize the Respondents' legal expenses and the diversion of management time."

IV.

CONCLUSION

After consideration of the entire record, it is held that the Settlement is approved. The Settlement properly balances the interests of the government and the Respondents in light of the facts and issues presented. Certainly, there can be no question that a trial in Taiwan, with foreign witnesses and the need for translation of their testimony, not to mention the assimilation of the documents involved, would impose a substantial financial burden on all of the parties. The resulting briefs, initial decision, potential exceptions, Commission review, and perhaps judicial review, would add to that burden. Further, as has been noted, the issues involved are complex, involving questions of governmental authority as well as questions of estoppel, which, in the final analysis, might involve issues and agencies which

if not beyond the reach of the Commission and its regulations might well require joint input and joint action. Finally, in addition to the above, it is held that the Settlement and the payments scheduled in it, properly serves to deter others from engaging in those activities which might raise the same issues involved in this proceeding. In so holding, it is noted and understood that the Settlement specifically provides that the Respondents are not admitting any wrongdoing. However, the payments being made by the Respondents are a heavy price to pay for the right to argue they are without fault, and others would do well to avoid that predicament.

Before completing this decision it is necessary to discuss paragraphs 4 and 5 of the Settlement. Paragraph 4 is, in effect, an Order of Confidentiality providing that all written material produced by the Respondents pursuant to or in connection with the Section 15 Order or the Commission's Order of Investigation, "shall continue to be held in confidence by the Commission," and providing how Hearing Counsel should treat the material submitted. It also provides that 18 months after the settlement becomes administratively final, the materials retained by Hearing Counsel shall, upon request, be returned to the Respondent which produced the material. Having approved the Settlement, this writer, of course, can have no objection to paragraph 4. However, it must be made clear to both parties that those documents already on file with the Commission's Secretary are a matter of public record, and they must remain so if the deterrent aspect of the Settlement is to be effective.

As to paragraph 5 of the Settlement, it provides, "that no finding or stipulation of fact in this proceeding may be used by any person against any Respondent in any way in any other proceeding." On first reading this provision, this writer considered rejecting it insofar as it bound third parties not a party to this action as well as courts in other possible proceedings. On contacting the parties, they all agree that their primary intent was to bind Hearing Counsel and the Commission and, insofar as the law allows, to also bind third parties who seek to use the stipulation of facts. They recognize that the Settlement, standing alone, has no effect on third parties or other tribunals, and that neither Hearing Counsel nor the Commission is required by the Settlement to become a party in any other proceeding. With this understanding of its meaning, paragraph 5 of the Settlement is hereby approved.

Order

It is Ordered, that the Settlement Agreement be approved, and that the terms and the conditions of the Settlement are incorporated in this paragraph as if more fully set forth herein. Also, the payments set forth in paragraph 2 of the Settlement Agreement shall be made no later than 45 days after this decision becomes final. It is further ordered that this settlement in no

way affects the issues raised in Docket No. 87-2 (Yangming) which shall survive the Settlement Agreement made in this proceeding.

Joseph N. Ingolia
Administrative Law Judge

Washington, D.C.
January 29, 1988

FEDERAL MARITIME COMMISSION

DOCKET NO. 86-30

INVESTIGATION OF UNFILED AGREEMENTS -
YANGMING MARINE TRANSPORT,
EVERGREEN MARINE CORPORATION
AND ORIENT OVERSEAS CONTAINER LINE, INC.

ORDER ADOPTING INITIAL DECISION

This proceeding was commenced by an Order of Investigation served November 25, 1986, to determine whether Yangming Marine Transport, Evergreen Marine Corporation and Orient Overseas Container Line, Inc. (" Respondents"), had violated section 15 of the Shipping Act, 1916, 46 U.S.C. § 814 (1982), or section 10(a) of the Shipping Act of 1984, 46 U.S.C. app. § 1709, by discussing rates and attempting to set rates in the United States to Taiwan trade without an effective agreement on file at the Commission.

On February 3, 1988, Administrative Law Judge Joseph N. Ingolia served an Initial Decision ("I.D.") approving a settlement negotiated with the Respondents by the Commission's Bureau of Hearing Counsel. Under the settlement, Respondents have agreed to cease and desist permanently from discussing and attempting to fix rates for the common carriage of commodities in the United States to Taiwan trade, until such time as an agreement authorizing

such activity is filed with the Commission and becomes effective pursuant to the Shipping Act of 1984. Without admitting any violations of law, Respondents have further agreed to pay civil penalties totaling $400,000, with interest.

Upon review of the I.D., the Commission finds that the settlement is appropriate and meets the standards previously established by this agency. The potential costs and uncertainties of success associated with litigation are valid factors to be weighed in both the negotiation of a particular settlement and the subsequent review of any agreement reached. Far Eastern Shipping Co. - Possible Violations of Sections 16, Second Paragraph, 18(b)(3), and 18(c), Shipping Act, 1916, ___ F.M.C. ___, 21 S.R.R. 743, 759-61 (administratively final May 7, 1982). This does not mean that a settlement can be justified by the mere fact that, as in this case, the respondent is a foreign company and that necessary witnesses or information are located overseas, thus increasing the relative costs of further investigation. Such an approach inevitably would lead to different standards of justice being applied to carriers of different nationalities. Here, however, the Commission is satisfied that the civil penalties and cease and desist order agreed to by Respondents will further the agency's enforcement policies and serve as a significant deterrent against possible unlawful rate agreements in the United States to Taiwan trade.

THEREFORE, IT IS ORDERED, That the Initial Decision is adopted;

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

Joseph C. Polking
Secretary